RECENT DECISIONS.

ARNOLD BROCK, *Editor-in-Charge.*

APPEAL AND ERROR—JUDGMENT AGAINST JOINT TORT-FEASORS—PARTIAL REVERSAL.—After the rendering of a joint judgment against two tort-feasors, *held,* the judgment could be reversed as to one defendant and affirmed as to the other. *Brown & Sons Lumber Co.* v. *Sessler* (Tenn. 1914) 163 S. W. 812.

At common law, a verdict against several defendants could not be set aside as to one defendant without being set aside as to all. This rule rested on the technical ground that when a verdict was set aside, a *venire facias de novo* was awarded, and no notice was taken of the first *venire* or the proceedings under it, so that there was nothing left on the record to support the verdict. See *Bicknell* v. *Dorion* (Mass. 1835) 16 Pick. 478. But since in this country no *venire* is awarded in making up the record, the technical reason for the old rule is gone, and it is generally held that a verdict against two or more defendants who are severally liable may be set aside as to some of them and allowed to stand as to the rest, *Sparrow* v. *Bromage* (1910) 83 Conn. 27, or that the plaintiff may at any time before judgment dismiss the case against some of the defendants and take judgment against the rest. *Nordhaus* v. *Vandalia Ry.* (1909) 242 Ill. 166. Under the American doctrine that joint tort-feasors are severally as well as jointly liable, Freeman, Judgments (3rd ed.) § 236; Cooley, Torts (3rd ed.) 223-227, this modern rule applies to verdicts against joint tort-feasors. *Sparrow* v. *Bromage, supra; Ill. Central Ry.* v. *Foulks* (1901) 191 Ill. 57, 69. But in the case of the reversal of a judgment against several defendants many courts still adhere to the old rule that such a judgment is an entirety, and that it must stand or fall together. 1 Black, Judgments (2nd ed.) § 211; *Devine* v. *Illinois Tel. Co.* (1911) 159 Ill. App. 600. But, as is indicated by the principal case, the modern tendency is to limit this technical, unjust rule to cases where the defendants are only jointly liable, and to permit partial reversals where the defendants are severally liable; *Moreland* v. *Durocher* (1899) 121 Mich. 398; *Schultz* v. *U. S. Fidelity Co.* (1911) 201 N. Y. 230; see *St. John* v. *Andrews Institute* (1908) 192 N. Y. 382; and this tendency has been assisted in many states by statutes. *Shreeder* v. *Davis* (1906) 43 Wash. 129.

APPEAL AND ERROR—NEW TRIAL—ORDER TO DISMISS COMPLAINT.—In an action at law which was tried before a jury, the uncontroverted facts showed that the complaint should have been dismissed on the defendant's motion. *Held,* under § 1317 of the Code of Civil Procedure, as amended by c. 380, Laws of 1912, the Appellate Division had discretionary power to direct the entry of the judgment of dismissal without going through the useless formality of ordering a new trial in which the trial judge would necessarily dismiss the complaint. *Peterson* v. *Ocean Electric Ry.* (N. Y. App. Div. 1914) N. Y. L. J., April 1, 1914.

The Supreme Court has decided that the Seventh Amendment to the Constitution debars federal appellate courts from directing an entry of judgment in this manner. *Slocum* v. *New York Life Ins.*

Co. (1913) 228 U. S. 364. The objections to that doctrine were pointed out in 13 Columbia Law Rev. 544. It is gratifying to note that the state courts recognize that they are not bound by this technical rule, which, however, necessarily follows from the strict interpretation of the Seventh Amendment.

ASSIGNMENTS FOR BENEFIT OF CREDITORS—CONDITIONS REQUIRED RELEASES—VALIDITY OF ASSIGNMENT.—A debtor conveyed a portion of his property to a trustee to be distributed among those of his creditors who should release him from all remaining claims if the property should be insufficient to satisfy their claims in full. *Semble,* the assignment was invalid as to non-assenting creditors. *MacLaren* v. *Kramar* (N. Dak. 1913) 144 N. W. 85.

In the case of a general assignment in trust for those creditors who should consent to release him from all debts, with no directions for disposing of any possible residue, a resulting trust will be implied in favor of the assignor as regards such residue. *Ingraham* v. *Wheeler* (1826) 6 Conn. 277; *Collier* v. *Davis* (1886) 47 Ark. 367. Accordingly, the weight of authority is opposed to the validity of such an arrangement, *Sperry* v. *Gallaher* (1889) 77 Ia. 107; *Moore* v. *Bettingen* (1911) 116 Minn. 142; but see *Halsey* v. *Whitney* (C. C. 1826) 4 Mason 206, 229; *MacAvoy* v. *Jennings* (1906) 44 Wash. 79, on the ground that it tends to coerce the creditors into making disadvantageous terms which will result in a benefit to the debtor himself. See *Miller* v. *Conklin* (1855) 17 Ga. 430. And although an insolvent debtor has, in the absence of statute, always been permitted to make a *bona fide* preference, this right is denied where the result is to hinder, delay or defraud his creditors. See *Hardin* v. *Osborne* (1871) 60 Ill. 93. Where, however, the effect of the assignment is merely to favor those creditors who give a release and distribute any possible residue *pro rata* among the other creditors, there would seem to be no more than an ordinary preference effected, and since the assignor takes no benefit thereby, the validity of the arrangement should be sustained. *Ashurst* v. *Martin* (Ala. 1839) 9 Port. 566; *contra, Grover* v. *Wakeman* (N. Y. 1833) 11 Wend. 187. On the other hand, where releases are demanded as a condition of sharing in only a part of the debtor's property, the assignment should be held void under all circumstances, as not indicating an honest intention of the debtor to apply all his non-exempt property to the payment of his creditors. *Henderson* v. *Bliss* (1856) 8 Ind. 100; *Seaving* v. *Brinkerhoff* (N. Y. 1821) 5 Johns. Ch. 329.

ASSIGNMENTS—SCOPE OF LEGAL ASSIGNMENTS OF UNEARNED WAGES.—An employee of the defendant assigned to the plaintiff his wages for the next six months. *Semble,* the plaintiff could not recover in a suit at law, in the absence of proof that the defendant had definitely contracted to employ the assignor for the period covered by the assignment. *Heller* v. *Lutz* (Mo. 1914) 164 S. W. 123. See Notes, p. 515.

BANKRUPTCY—BAILMENTS—CONSIGNMENT FOR SALE.—A manufacturer delivered property to a corporation which was formed to represent a dealer and occupied the latter's premises. The consignor reserved title until sale by the consignee, who was bound to return or account for unsold goods. *Held,* the transaction was in the nature of a bailment, and since there was no fraud or appearance of ownership in the bankrupt consignee, it was valid against his trustee in bankruptcy. *Ludvigh* v. *American Woolen Co.* (1913) 34 Sup. Ct. Rep. 161.

When goods are delivered to a consignee to sell as his own, and his obligation extends no further than the payment of a fixed price, the real contract is one of sale, *Ex parte White* (1871) L. R. 6 Ch. App. *397, since a factor cannot consistently with his agency, which is essential to a valid consignment, see *In re Penny & Anderson* (D. C. 1909) 176 Fed. 141, obtain profit for himself in addition to his commission; and it is ineffectual to disguise such a transaction by denomination as a consignment. *In re Wells* (D. C. 1905) 140 Fed. 752. When, however, the consignor has provided for the disposal of the entire proceeds, *In re Galt* (C. C. A. 1903) 120 Fed. 64, or the identical article is to be returned in the same or altered form, *Sturm* v. *Boker* (1893) 150 U. S. 312, there is both the desired security and the necessary agency for a real consignment. And, so long as there is the requisite power to require restoration, *In re Columbus Buggy Co.* (C. C. A. 1906) 143 Fed. 859, which is beyond the control of the consignee, *Powder Co.* v. *Burkhardt* (1877) 97 U. S. 110, the result is the same, even in the absence of a limitation upon the price for which the consignee may sell. *Harris* v. *Coe* (1898) 71 Conn. 157. But, while the transaction in the principal case does not lose its effect as a bailment by the factor's guaranteeing the credit of his vendee, *In re Taft* (C. C. A. 1904) 133 Fed. 511, the result intended by the parties, although fairly capable of different interpretations, would, in view of all the circumstances and the doubtful good faith attendant thereon, seem rather to have been a sale, as held by the District Court. (D. C. N. Y. 1910) 176 Fed. 145.

BANKRUPTCY—FRAUDULENT CONVEYANCES—RIGHTS OF MORTGAGEE.—An insolvent, for the purpose of fraudulently preferring certain creditors, mortgaged property for a valuable consideration to the claimant who knew of the insolvency. *Held,* the mortgagee was entitled to priority unless it appeared he had participated in the fraud. *In re Soforenko* (D. C. Mass. 1913) 210 Fed. 562.

Since there is no necessary connection between an intent to prefer and an intent to defraud, *Van Iderstine* v. *National Discount Co.* (1913) 227 U. S. 575; *Coder* v. *Arts* (1909) 213 U. S. 223, no transfer of property can be avoided by the trustee under § 67(e) of the National Bankruptcy Act, unless the insolvent actually attempted to defraud his creditors, but even in this case the transfer will be valid as to a mortgagee if he is a purchaser for value and acts in good faith. Formerly, the courts, led astray because of their failure to distinguish between a fraudulent conveyance and a preference, see *In re McLam* (D. C. 1899) 97 Fed. 922, presumed bad faith on the part of the transferee if they found a fraudulent intent on the part of the bankrupt, see *Doken* v. *Page* (C. C. A. 1906) 147 Fed. 438, but impelled by commercial necessity and in order to give the insolvent an actual chance to retrieve his fortunes, the courts at present require something amounting to a participation in the fraud by the transferee in order to avoid the transfer. *Van Iderstine* v. *National Discount Co., supra.* Such collusion may, however, be evidenced by a wilful disregard of the facts which would lead to a discovery of the mortgagor's fraudulent intent, and in such cases the burden of proving *bona fides* is cast upon the purchaser. See *Bentley* v. *Young* (D. C. 1914) 210 Fed. 202. Therefore, although the mortgagee, in the principal case, knew of the insolvency, and that the money was to be used in preferential payments, still the mortgage would be valid unless there was a finding that he in some way participated in the fraud.

BANKRUPTCY—PREFERENCES—STATUTE OF LIMITATIONS—PAYMENT TO RENEW DEBT.—Before filing his petition in bankruptcy, an insolvent debtor paid one dollar to each of two creditors whose claims were barred by the Statute of Limitations, with the statement that he did so to renew the debt. They had no knowledge of his insolvency. *Held,* the claims of such creditors should be allowed. *In re Banks* (D. C. N. Y. 1913) 207 Fed. 662.

Since a debt barred by the Statute of Limitations is provable, although not allowable in bankruptcy, see *Hargadine etc. Co.* v. *Hudson* (C. C. A. 1903) 122 Fed. 232, the persons favored in the principal case were creditors within the meaning of the Bankruptcy Act. See Bankruptcy Act of 1898, § 1, "creditor". Accordingly, since payment upon a barred debt is not in itself a fraudulent conveyance, *Nat. Bank* v. *Kimble* (1881) 76 Ind. 195, § 67e of the Bankruptcy Act is not applicable, and the transaction must be attacked, if at all, as a preferential transfer. Assuming that the payment might have been recovered by the trustee, although it is at least doubtful whether the transfer of so small a sum would constitute a preference, see 1 Loveland, Bankruptcy (4th ed.) 316, it would seem on principle that the bar of the statute should not again take effect. A new promise to pay is inferred from part payment, see *Harper* v. *Fairley* (1873) 53 N. Y. 422, 444, and unless the court should take the view that a payment in fraud of law would not support such an inference, the presumption should continue as between the parties, even after payment has been recovered. See *In re Lane* (1889) L. R. 23 Q. B. D. 74, 76. Moreover, since a defense to a debt or contract liability under the Statute of Limitations is not property, *Campbell* v. *Holt* (1885) 115 U. S. 620, it can hardly be the subject of a fraudulent conveyance or a preference. *Cf. In re Zorn & Co.* (D. C. 1912) 193 Fed. 299. As the court in the principal case found that the favored creditors did not have reasonable cause to believe that a preference would be effected, § 60b, relating to preferences, is inapplicable in any event. In a case where the creditors had such knowledge, however, there would seem to be strong considerations of public policy against allowing them to share on equal terms with creditors whose claims were not barred, and the subject would therefore seem to be a proper one for statutory interference.

BANKRUPTCY—RIGHTS OF TRUSTEE UNDER AMENDMENT OF 1910, § 47a (2)—MATERIALMAN'S LIEN FILED AFTER ADJUDICATION IN BANKRUPTCY.—The plaintiff, as the bankrupt's subcontractor, furnished certain materials to the defendant prior to the bankruptcy. Two days after the adjudication the plaintiff filed a mechanic's lien for the value of such materials. *Held,* the Amendment of 1910, § 47a (2) did not give the trustee a superior lien to that of the materialman. *Hildreth Granite Co.* v. *Watervliet* (1914) 146 N. Y. Supp. 449. See Notes, p. 517.

BANKRUPTCY—VOIDABLE TRANSFERS—ASSIGNMENT OF ACCOUNTS.—A corporation contracted, as security for loans made to enable it to secure shipments, to assign all accounts for goods obtained thereby when they were sold. *Held,* assignments under this contract, though within four months of the corporation's bankruptcy, were valid against the bankrupt's general creditors without liens, since unaccompanied by actual fraudulent intent or knowledge of insolvency. *Greey* v. *Dockendorf* (1913) 34 Sup. Ct. Rep. 166.

A transfer of property within the four months' period in pursuance of a mere agreement entered into before that time, which does not

operate as an assignment *in praesenti, Long* v. *Farmer's State Bank* (C. C. A. 1906) 147 Fed. 360, may, when it diminishes the bankrupt's estate available for distribution among creditors, be avoided by the trustee in bankruptcy. 1 Loveland, Bankruptcy, 980 *et seq; In re Dismal Swamp Contracting Co.* (D. C. 1905) 135 Fed. 415; *In re Great Western Mfg. Co.* (C. C. A. 1907) 152 Fed. 123; see *Tilt* v. *Citizen's Trust Co.* (D. C. 1911) 191 Fed. 441. If, however, the agreement is specifically enforcible, such a delivery does not constitute a preference, unless the right of intervening creditors are affected. *In re Automobile Livery Service Co.* (D. C. 1910) 176 Fed. 792. And when the agreement concerns identifiable property and is certain and definite, most courts have justified this result as giving effect to the intention of the parties. Black, Bankruptcy, § 585; *Goodnough Mercantile, &c., Co.* v. *Galloway* (D. C. 1909) 171 Fed. 940; see *Sexton* v. *Kessler* (1912) 225 U. S. 90, and note in 40 L. R. A. [N. S.] 639. When the very property for which the advances were made is to be returned as security, the taking of possession relates back to the time of the original contract, *Thompson* v. *Fairbanks* (1905) 196 U. S. 516; *cf. Hurley* v. *Atchison T. & S. F. Ry.* (1909) 213 U. S. 126, and the pledgee has an even greater equity. *Sabin* v. *Camp* (C. C. 1900) 98 Fed. 974; *contra, In re Sheridan* (D. C. 1899) 98 Fed. 406. A transfer of accounts, moreover, would seem not included within the American doctrine of reputed ownership. *In re Cotton Mfrs. Sales Co.* (D. C. 1913) 209 Fed. 629; see *Sexton* v. *Kessler, supra; Young* v. *Upson,* (C. C. 1902) 115 Fed. 192. It follows that the principal case, disclosing neither intent to prefer, *Coder* v. *Arts* (1909) 213 U. S. 223, nor to defraud, *Van Iderstine* v. *National Discount Co.* (1913) 227 U. S. 575, would seem to have been correctly decided.

CARRIERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE IN THE OWNER OF PROPERTY CONTIGUOUS TO RAILROAD.—Sparks from a passing locomotive set fire to flax straw stored upon land abutting on the railroad. *Held,* in the absence of any other facts than that the plaintiff stored his property near the railroad, he was, as a matter of law, not contributorily negligent. *Leroy Fibre Co.* v. *Chicago, Milwaukee & St. Paul Ry.* (1914) 34 Sup. Ct. Rep. 415.

The owner of property has a right to use his property in the ordinary and usual way, and while this is subject to the exercise of the same right in others, it cannot be said that it is also limited by probable negligence or unlawful use of property by another. See *Fero* v. *Buffalo etc. R. R.* (1860) 22 N. Y. 209, 215. Accordingly, the owner of land contiguous to a railroad has a right to presume that the carrier will not be guilty of negligence, *Railroad* v. *Short* (1903) 110 Tenn. 713, and, so long as he leaves his land in its natural state or makes legitimate use thereof, since the standard of duty in such cases is definite and certain, see 6 Columbia Law Rev. 341, as a matter of law, he should not be charged with contributory negligence. See 3 Elliott, Railroads (2nd ed.) § 1238; 3 Shearman & Redfield, Negligence (6th ed.) 1774; 2 Thompson, Negligence, 1236. This, moreover, is fortified in this particular case by the principle that a railroad is a dangerous instrumentality, and certainly it is the proper domain of the court to determine what degree of care is commensurate with the great danger to which the property is exposed. See *Richmond etc. R. R.* v. *Medley* (1881) 75 Va. 499. But when, as in the case where fire is already upon the premises, the danger becomes "seen" as contrasted with "anticipated", the question of contributory negligence then becomes one for the jury to determine. *Snyder* v. *P. C. & St. L. Ry.* (1887) 11 W. Va. 14.

Although the prevailing rule would seem to leave the entire question of negligence to the jury, 3 Elliott, Railroads (2nd ed.) 546, for the practical reason that collateral facts are generally in dispute, there is, nevertheless, a manifest tendency, on principle, to withdraw this question entirely from the jury whenever possible. See 9 Columbia Law Rev. 154.

CONSPIRACY—COMBINATIONS TO BOYCOTT "OPEN SHOPS"—INJUNCTION.—The members of certain trade unions adopted a rule, enforcible by fine or expulsion, that no union laborer should work on the products of the plaintiff's or other "open shops." *Held,* on authority of *Loewe* v. *Lawlor* (1908) 208 U. S. 274, that the defendants had combined for an unlawful purpose, that they were therefore guilty of a criminal conspiracy under § 580 of the Penal Code of New York, and that an injunction should issue. *Irving* v. *Neal* (D. C. S. D. N. Y. 1913) 209 Fed. 471.

While it may be admitted that the defendants' agreement constituted a combination in restraint of trade as well under the Federal Anti-Trust Law (26 U. S. Stat. L. 209), see *Loewe* v. *Lawlor, supra,* as under § 340 of the General Business Law of New York (Laws 1909, c. 25), and was therefore a statutory crime, still no one is entitled to injunctive relief under those statutes but the Attorney General of the Nation or of the State. See *National Fireproofing Co.* v. *Mason Builders' Assn.* (C. C. A. 1909) 169 Fed. 259. Before these statutes, agreements in restraint of trade were merely invalid and unenforcible, which is far from saying that they were criminal or gave a right of action to third persons for injury sustained. See *Hornby* v. *Close* (1867) L. R. 2 Q. B. 153; *United States* v. *Addyston etc. Co.* (C. C. A. 1898) 85 Fed. 271. The principal case, in deciding that the penal code had been violated simply because the facts were indistinguishable from those which had previously been held to constitute a violation of the Anti-Trust Law, seems to lose sight of the distinction between the two crimes. It is true that a conspiracy to commit a statutory crime is itself criminal under the penal code, but the propriety of adopting this reasoning to secure an injunction for an injured employer when none could be obtained under the statute is at least doubtful. To sustain the spirit of the law, it should appear that the defendants' act is criminal not merely because it is a restraint of trade but because it amounts to a conspiracy to injure trade and commerce as defined by the New York cases. But even if this standard be adopted the circumstances of the principal case seem to justify the decree rendered. See *Newton Co.* v. *Erickson* (N. Y. 1911) 70 Misc. 291; *People* v. *McFarlin* (N. Y. 1904) 43 Misc. 591; *cf. People* v. *Radt* (1900) 71 N Y. Supp. 846; *Purvis* v. *Local No. 500* (1906) 214 Pa. 348.

CONSTITUTIONAL LAW—CONTROL OF EXCESSIVE STATE INSPECTION FEES.—The Maryland Oyster Law provided for the inspection of oysters imported from other States, with a fee of one cent a bushel, which yielded a yearly revenue of $40,000. The cost of the service being only $15,000, the surplus was devoted to carrying out the other provisions of the law. *Held,* the inspection clause was unconstitutional. *Foote* v. *Stanley* (1914) 34 Sup. Ct. Rep. 377.

The Constitution expressly provides that "no State shall * * * lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. 1, § 10. But since revenues of this character must perforce be calculated in

advance, courts are reluctant to criticise legislatures when the inspection fees produce more than is strictly necessary, *Atlantic etc. Tel. Co.* v. *Philadelphia* (1903) 190 U. S. 160, 164, unless there is clearly a flagrant attempt to secure revenue under the guise of an inspection law. *Foote* v. *Clagett* (1911) 116 Md. 228; *Postal Tel. Co.* v. *Taylor* (1904) 192 U. S. 64; *cf. Brimmer* v. *Rebman* (1891) 138 U. S. 78, 83. Confused by this lenient practice and needlessly unwilling to declare a *bona fide* inspection law void because of a mere miscalculation in the fee, courts have indicated that the correction of excessive fees must be left solely to the enacting legislature or to Congress, under its power to revise such taxes. *Neilson* v. *Garza* (C. C. 1876) 2 Woods 287; see *Turner* v. *Maryland* (1882) 107 U. S. 38, 54. The courts, however, have concurrent jurisdiction over such matters. They always presume that the legislature fixes the fee correctly in the first place, and further, having due regard for the difficulty of making a correct determination in advance, presume that it will at the next session reduce a fee which proves excessive. See *Red "C" Oil Co.* v. *North Carolina* (1912) 222 U. S. 380. But the instant these two presumptions are overthrown, neither law nor reason could prevent the court from declaring unconstitutional an inspection law whose fees are in fact a regular source of profit to a State.

CONSTITUTIONAL LAW—POLICE POWER—FRAUDULENT CONVEYANCES—SALES IN BULK.—A statute, providing that sales in bulk be conclusively presumed fraudulent and void as against creditors of the vendor unless notice were given to them after a manner specified, was *held* constitutional. *Coach* v. *Gage* (Ore. 1914) 138 Pac. 847.

The great weight of authority supports the constitutionality of statutes making sales in bulk merely presumptively fraudulent in the event of failure to comply with their provisions. *Sprintz* v. *Saxton* (N. Y. 1908) 126 App. Div. 421; *contra, Off & Co.* v. *Morehead* (1908) 235 Ill. 40. When, however, the statute declares such sales void or voidable if its regulative provisions are not observed, it is held unconstitutional in a few jurisdictions on the ground that it takes property without due process of law, is class legislation and is unreasonably restrictive of the right to contract. *Wright* v. *Hart* (1905) 182 N. Y. 330. As the statute in the principal case, in making the presumption conclusive, is declarative, in effect, of a rule of substantive law rather than of a rule of evidence, see *Jaques etc. Co.* v. *Carstarphen etc. Co.* (1908) 131 Ga. 1, it may be regarded as open to the same objections. But the majority of courts have properly regarded similar legislation as a legitimate exercise of the police power in restraint of notoriously fraudulent practices, even when limited in its application to a particular class of persons, provided such limitation be reasonable in view of the evil sought to be prevented. *Lemieux* v. *Young* (1908) 211 U. S. 489; *Hirth-Krause Co.* v. *Cohen* (1912) 177 Ind. 1. It should be noted, however, that even where the power of the legislature to regulate such sales is recognized, onerous or unreasonable provisions in particular statutes may have the effect of rendering them invalid. *McKinster* v. *Sager* (1904) 163 Ind. 671; see *Hirth-Krause Co.* v. *Cohen, supra,* p. 11; *Lemieux* v. *Young, supra,* p. 496.

CONSTITUTIONAL LAW—POLICE POWER—VALIDITY OF STATUTES FORBIDDING ASSIGNMENTS OF FUTURE EARNINGS.—A state statute declaring null and void assignments of wages, salaries and earnings not earned at the time the assignment was made, was *held* constitutional. *Heller* v. *Lutz* (Mo. 1914) 154 S. W. 123. See Notes, p. 515.

CONSTITUTIONAL LAW—REGULATION OF RATES—BUSINESS AFFECTED WITH A PUBLIC INTEREST.—The plaintiff, a fire insurance company, contended that a statute authorizing the state superintendent of insurance to regulate the rate to be charged for fire insurance was unconstitutional under the Fourteenth Amendment. *Held,* three judges dissenting, the statute was valid. *German Alliance Ins. Co.* v. *Lewis* (Sup. Ct. Oct. Term, 1913), No. 120. Not yet reported.

Since all private enterprises to some extent affect the public, the rather vague rule enunciated in *Munn* v. *Illinois* (1876) 94 U. S. 143, that "any business affected with a public interest is subject to rate regulations", has literally a very wide scope. While the degree of interest to the public which is necessary to subject a business to this regulation is apparently a matter for judicial discretion, that consideration has been largely governed by the monopolistic character of the business and the consequent ability to oppress the public. It is obvious, therefore, that the decision in the principal case involves a considerable extension in this field of law, although it seems impossible to formulate, from the opinion, any definite rule by which the courts can be governed. For a further discussion of the principle involved, see 6 Columbia Law Rev. 259.

CORPORATIONS—DE FACTO CORPORATIONS—EMINENT DOMAIN.—*Held,* a *de facto* corporation is entitled to exercise the power of eminent domain. *Roaring Springs Townsite Co.* v. *Paducah Tel. Co.* (Tex. Civ. App. 1914) 164 S. W. 50.

Since the right of eminent domain is an attribute of sovereignty, exercisable on behalf of a private corporation only through a delegation by the State, it is held in some jurisdictions that to prove such delegation, strict compliance with the conditions thereto attached must be shown; and a mere *de facto* incorporation is held insufficient. See *Matter of Union El. R. R.* (1889) 112 N. Y. 61; *Tulare Irrigation District* v. *Shepard* (1902) 185 U. S. 1, 17; *Orrick School District* v. *Dorton* (1894) 125 Mo. 439. This theory, however, if valid at all, should apply only where incorporation is one of the statutory conditions precedent to eminent domain. *Cf. Ill. State Trust Co.* v. *St. Louis, etc. Ry.* (1904) 208 Ill. 419. Where the question is not, as in the principal case, one of due incorporation, but concerns compliance with conditions of the charter which are to be performed after incorporation, the test is whether the condition is such that its breach *ipso facto* kills the corporate entity or only gives the State an option to bring *quo warranto, Matter of N. Y. & L. I. Bridge Co.* (1896) 148 N. Y. 540; *Matter of Brooklyn, W. & N. Ry.* (1878) 72 N. Y. 245, although its application to specific facts may be difficult. The latter situation seems to be strictly analogous to that in the principal case, since a *de facto* corporation is a legal entity valid against all parties except the State; and the result in the principal case, which is supported by the weight of authority, *National Docks R. R.* v. *Central R. R.* (1880) 32 N. J. Eq. 755; *Chicago etc. R. R.* v. *Heidenreich* (1912) 254 Ill. 231; *Central of Georgia Ry.* v. *Union Springs & No Ry.* (1905) 144 Ala. 639; *cf. Schroeder* v. *Detroit etc. Ry.* (1880) 44 Mich. 387, follows logically therefrom.

CORPORATIONS—DIVIDENDS—AVAILABLE PROFITS.—A corporation, being compelled by court order to dispose of certain stocks exchanged them for stock of another corporation at a profit of $65,000,000 on the

original investment. At the same time the conversion of a large number of $175 bonds into $100 shares transmuted $15,000,000 from liability to profit. These two sums being made the basis of a special dividend of forty per cent on the common stock, certain preferred stockholders objected. *Held,* this was a proper dividend based on profits. *Equitable Life Ins. Co.* v. *Union Pac. R. R.* (N. Y. Supreme Court, April 7, 1914). Not yet reported. See Notes, p. 524.

CORPORATIONS—INSOLVENCY—STATUTORY LIABILITY OF STOCKHOLDERS FOR INTEREST.—In a suit by depositors to enforce the statutory liability of stockholders of an insolvent bank, *held,* interest was to be added to the principal of the deposits provided the aggregate did not exceed the statutory limit. *Lamar* v. *Taylor* (Ga. 1914) 80 S. E. 1085. See Notes, p. 519.

CRIMINAL LAW—CONCEALED WEAPONS—STATUTORY PROHIBITION—CONSTRUCTION.—The defendant, having reason to believe that an act of adultery was about to be committed upon his wife, carried a pistol without a license. *Held,* his act was not unlawful, since Ga. Laws 1910, p. 134, prohibiting any person from having or carrying a pistol without a license, should receive a reasonable construction. *Harris* v. *State* (Ga. 1914) 80 S. E. 695.

A statute regulating the right to carry concealed weapons by restricting it to duly licensed persons is a constitutional exercise of the police power. See 12 Columbia Law Rev. 75. And, when persons carrying in self defense are not expressly exempted from the application of the penalty, a strict construction, sustainable on the ground that secret weapons are not essential to self protection, *State* v. *Speller* (1882) 86 N. C. 697, would forbid examination into the motives of the accused. *Carroll* v. *State* (1872) 28 Ark. 99. It would seem, however, that since this legislation was really designed to suppress the habit of carrying concealed weapons without just cause, *People* v. *Pignatoro* (1911) 136 N. Y. Supp. 155, the accused should not be held guilty when he can show that his possession of the weapon was temporary, for the protection of his person against an attack which he had reasonable cause to believe was imminent. *Page* v. *State* (Miss. 1911) 54 So. 725. And since the use of a weapon may be justifiable to defend the immediate members of a family, 1 Wharton, Criminal Law § 625, and also, according to many cases, by a husband to prevent an act of adultery upon his wife, even when she has consented thereto, see Note to *State* v. *Young* (Ore. 1908) 18 L. R. A. [N. S.] 688, possession of a weapon for these purposes should also be permitted. Such construction, although it may not be warranted by the express terms of the statute, is justifiable as giving effect to long established rights of persons, as well as to the probable intention of the legislature.

CRIMINAL LAW—EVIDENCE—TRAILING BY BLOODHOUNDS.—In a prosecution for murder the trial court admitted evidence of trailing by bloodhounds to identify the defendant as the murderer. *Held,* this was reversible error. *People* v. *Pfanschmidt* (Ill. 1914) 104 N. E. 804.

In the case of first impression, evidence of the conduct of bloodhounds in trailing the accused from the scene of the crime was readily admitted on the ground that the court should take judicial notice of the bloodhound's ability to follow the tracks of human beings with certainty. *Hodge* v. *State* (1893) 98 Ala. 10; see *State* v. *Hall* (1896)

3 Oh. N. P. 125. But by the leading case of *Pedigo* v. *Comm.* (1898) 103 Ky. 41, it was established that as a condition precedent to the admission of such evidence a preliminary foundation must be laid by showing that the dog is of a stock characterized by acuteness of scent and power of discrimination; that the particular animal is possessed of these qualities, and had been trained and tested; and that he had been laid upon a trail shown by other testimony to have been made by the guilty party. See *State* v. *Dickerson* (1907) 77 Oh. St. 34; *Spears* v. *State* (1908) 92 Miss. 613. And the rule has been further limited, in Kentucky, to cases where due precautions had been taken to prevent the confusion of the dog. *Sprouse* v. *Comm.* (1909) 132 Ky. 269; cf. *Comm.* v. *Hoffman* (1913) 52 Pa. Super. Ct. 272. Moreover, it seems that such evidence is never admitted unless there exists corroborative testimony tending to fix the guilt upon the accused. *State* v. *Hunter* (1907) 143 N. C. 607; *Parker* v. *State* (1904) 46 Tex. Crim. 461. But, even as thus restricted, this evidence has been declared utterly incompetent by one court on the grounds that its weight with the jury greatly exceeds its slight probative force, and that the jurors have no basis for judging of the considerations influencing the dog's decision. *Brott* v. *State* (1903) 70 Neb. 395. This view is to be preferred on principle, and its acceptance in the principal case is to be commended. See 51 N. Y. L. J. 576.

CRIMINAL LAW—MANSLAUGHTER—PHYSICIAN'S NEGLIGENCE.—In a prosecution for negligent manslaughter the trial court allowed the skill and care of the defendant, an osteopathist, to be tested by ordinary physicians' opinions. *Held,* negligent treatment by a physician is to be tested by the skill and care employed by members of his own school. *State* v. *Smith* (Ida. 1914) 138 Pac. 1107.

In civil actions for damages the negligence of a physician depends on whether he employed the degree of skill and care customary among practitioners of his own school, *Force* v. *Gregory* (1893) 63 Conn. 167; *Bowman* v. *Woods* (Ia. 1848) 1 Greene 441, for a physician professing to follow one system cannot be expected to practice another, 2 Beven, Negligence (3rd ed.) 1157, and a jury is not competent to pass on the relative value of treatments prescribed by different schools. *Patten* v. *Wiggin* (1862) 51 Me. 594. But where a person, as in the case of clairvoyants, assumes the duties of a physician by holding himself out as competent to administer medicines, he becomes liable for the degree of skill and care employed by regular physicians. *Nelson* v. *Harrington* (1888) 72 Wis. 591; *cf. Spead* v. *Tomlinson* (1904) 73 N. H. 46. In criminal actions, however, some courts have gone so far as to hold that gross ignorance of the danger of the treatment prescribed will not justify a conviction for manslaughter. *Comm.* v. *Thompson* (1809) 6 Mass. 134; *Rice* v. *State* (1844) 8 Mo. 561. The generally accepted rule, however, is that any person, whether licensed or unlicensed, assuming to treat disease, will be guilty of negligent manslaughter if he be either grossly ignorant or culpably inattentive. *Rex* v. *Williamson* (1807) 3 C. & P. 635; *State* v. *Hardister* (1882) 38 Ark. 605; *Comm.* v. *Pierce* (1884) 138 Mass. 165; *Rex* v. *Markuss* (1864) 4 Fost. & F. 356. And, of course, under this latter rule a physician would not be criminally liable where his negligence would not even give rise to a civil action. Thus a physician would not be guilty of manslaughter where he had used as high a degree of care and skill as the ordinary practitioner of his own school. 3 Wharton & Stille, Medical Jurisprudence, § 755.

EVIDENCE—DYING DECLARATIONS—CIVIL ACTIONS.—In an action to recover a balance claimed to be due from the defendants for a tract of land sold them by the plaintiff's testator, the latter's dying declaration purporting to give the facts of the transaction was offered as evidence. *Held,* it was admissible. *Thurston* v. *Fritz* (Kan. 1914) 138 Pac. 625. See Notes, p. 520.

FALSE IMPRISONMENT—REFUSING MEANS OF ESCAPE.—The defendant, having lowered miners into its shaft, refused on demand to operate the elevator to bring them to the surface. *Held,* this refusal did not make it liable to an action for false imprisonment. *Herd* v. *Weardale Coal Co.,* L. R. [1913] 3 K. B. 771.

The tort of false imprisonment consists in an unlawful restraint of the plaintiff's person. See *Thorp* v. *Carvalho* (N. Y. 1895) 14 Misc. 554, 558; *McCarthy* v. *De Armit* (1881) 99 Pa. 63, 71. The principal case proceeds upon the theory that no tort liability arose since the defendant placed no restraint on the plaintiffs but merely refused to act, which it could lawfully do. The fallacy of this position is perhaps demonstrated by the fact that carried to its logical end, the defendant would be neither tortiously nor criminally liable even though it refused absolutely and for all time to deliver the plaintiffs from the mine. That the plaintiffs were actually in the power of the defendant cannot be denied, as the plaintiff's ability to leave certain definite confines depended absolutely on the defendant. Thus the plaintiffs were in fact imprisoned by the defendant's omission or failure to act, and as the existence of negative torts can no longer be questioned, Burdick, Torts (2nd ed.) 4; Pollock, Torts (8th ed.) 27; 13 Harvard Law Rev. 659; *Pauley* v. *Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, the defendant's omission should give rise to a sort liability. *Whittaker* v. *Sanford* (1912) 110 Me. 77. Therefore, it is submitted that one who is responsible for the entry of others into a given place relying on him for a means of exit is bound to furnish this key of escape, and for failure to do so becomes liable for damages in an action for false imprisonment. Of course, the fact that the plaintiffs were at the time of their demand under contract to stay in the mine would not affect the defendant's liability for false imprisonment but would merely give rise to a counter action for breach of contract.

HUSBAND AND WIFE—COMPETENCY OF WIFE TO TESTIFY AGAINST HUSBAND—CRIME AGAINST WIFE.—In a prosecution against a father for wilfully failing to supply his child with necessaries under a statute making such neglect a misdemeanor, the wife testified against him. *Semble,* the evidence was properly received, since the offense constituted a direct violation of the marital rights of the wife by imposing additional burdens upon her, and hence was a crime against her. *Hunter* v. *State* (Okla. 1913) 134 Pac. 1134.

The common law undoubtedly was that one spouse was incompetent to testify against the other except in cases of corporal violence. See 6 Columbia Law Rev. 469. The reasons for this rule, although very unsatisfactory, were nevertheless designed to prevent marital dissension, and were also based upon the repugnance to convict one spouse upon the testimony of the other. 4 Wigmore, Evidence, § 2228. The necessities of justice, however, demanded a relaxation of the rigid common law rule, and as a result many courts hold that the language of a statute, as in the principal case, worded so as to allow the wife's testi-

mony in any prosecution "for a crime committed one against the other" establishes a new and broader rule; on the other hand, some jurisdictions hold that such statutes are merely declaratory of the common law. See *Bassett* v. *United States* (1890) 137 U. S. 496. The former, consequently, consider the wife a competent witness not only under such a statute, against the husband in prosecutions for bigamy, *State* v. *Sloan* (1880) 55 Ia. 217; *Hills* v. *State* (1901) 61 Neb. 589; *contra, People* v. *Quanstrom* (1892) 93 Mich. 254, but some jurisdictions, adopting a broader view, include, as one of the common law exceptions, the crime of abandonment, *State* v. *Bean* (1904) 104 Mo. App. 255; *Carnley* v. *State* (1909) 162 Ala. 94, since the wife is directly injured, and it is therefore essentially a crime against her. Although the court in *State* v. *Bennett* (1870) 31 Ia. 24, in allowing the wife to testify in an action for adultery, was influenced by a second statute making the wife the "only prosecuting witness," it is submitted that the same result would have been reached even in the absence of such statute, since the wife might merely be regarded as the one to set the legal machinery in motion, and not as a competent witness. *State* v. *Armstrong* (1860) 4 Minn. 335. The decision in the principal case represents this tendency to include a larger class of crimes not involving personal violence as being "crimes one against the other", and would seem, therefore, to be perfectly sound on that basis.

INSURANCE—RECEIPT OF PREMIUM—CONDITION OF PREPAYMENT.—A policy of insurance acknowledged receipt of the premiums for six months, whereas they had only been paid for three. *Held,* the company was estopped to deny the receipt of the premiums for the entire six months in an attempt to invalidate the policy for non-payment of the last three. *Britton* v. *Metropolitan Life Ins. Co.* (N. C. 1914) 80 S. E. 1072.

When an insurance premium has not actually been paid but the policy on its face acknowledges receipt of the same, a few jurisdictions hold that such receipt does not estop the company from denying that it has received payment, but even these courts often sustain such policies by working out a waiver by the company of the condition of prepayment, *Sheldon* v. *Atlantic Ins. Co.* (1863) 26 N. Y. 460, and an unconditional delivery of the policy has been construed as such a waiver. *Boehen* v. *Williamsburgh Ins. Co.* (1866) 35 N. Y. 131. By the weight of authority, however, the company is estopped by such receipt from denying payment when it seeks to invalidate the policy. 1 Joyce, Insurance, § 86; *Basch* v. *Humbolt Ins. Co.* (1872) 35 N. J. L. 429. This doctrine seems to have developed from some early cases involving marine insurance, see *DeGaminde* v. *Pigou* (1812) 4 Taunt. 246, where the peculiar relations of underwriter, broker and assured, which rarely if ever exist now, led to the result reached. The courts, however, hold that the company is not estopped by the receipt in an action to collect the premium. 1 Joyce, Insurance, § 86. The fact that a similar rule is applied to such acknowledgments in deeds of conveyance, *Kendrick* v. *Mutual Ins. Co.* (1899) 124 N. C. 315, and that the receipt generally may be contradicted in a suit to collect, see 2 May, Insurance (4th ed.) § 359, gives support to the distinction made. On the whole the estoppel theory seems preferable, since in reaching the same result by finding that the insurer has waived payment, the courts have been obliged to make inferences which the facts hardly support. See *Boehen* v. *Williamsburg Ins. Co., supra;* Vance, Insurance, 180.

INSURANCE—WRITTEN NOTICE OF LOSS—DOUBLE AGENCY.—The defendant issued to the plaintiff a policy of employer's liability insurance containing a provision that the insured must furnish written notice to the insurance company or its agent of any casualty occurring among the insured's employees. X, the general manager of the plaintiff, was the general agent of the defendant, and although he had knowledge of the accident by virtue of his position of general manager of the plaintiff, did not furnish himself with written notice of the accident. *Held,* the company's liability did not arise for lack of the written notice called for in the policy. *Utica Sanitary Milk Co.* v. *Casualty Co. of America* (1914) 210 N. Y. 399.

As the agent of the insurance company had full and complete knowledge of the accident, the only apparent objection to a recovery is that as general manager of the plaintiff he failed to perform the purely technical act of giving himself notice in writing. Assuming that in his capacity of general agent X had immediately notified his company of the casualty, it could hardly be argued that the defendant was not liable because he had not first notified himself of the accident, especially since the purpose of these stipulations with regard to notice is to give the company by its agent or otherwise opportunity to investigate the accident. Fuller, Accident & Employer's Liability Insurance, 368, 470. It would indeed seem to be better to rule as a matter of law, as did the lower court (N. Y. 1912) 152 App. Div. 898, that no notice was required in this case because of the dual relationship of X. Moreover, insurance companies can always waive such stipulations, *Reynolds* v. *Equitable Accident Assn.* (1888) 1 N. Y. Supp. 738; *Ramsey* v. *General Accident etc. Ins. Co.* (1912) 160 Mo. App. 236, and any agent having authority to receive such notice can waive it. Fuller, Accident & Employer's Liability Insurance, 410, 478. Therefore, as it would have been an absurd formality for X to notify himself, it would seem that as general agent he could be said to have waived notice from himself as general manager.

INTERSTATE COMMERCE—REPARATION FOR OVERCHARGE—JURISDICTION OF COURT AND COMMISSION.—A shipper based his claim against a carrier for damages on the unreasonableness of a rate, and alleged that the Interstate Commerce Commission had, in another proceeding by different shippers against the same carrier, found the rate unreasonable. *Held,* the shipper could begin his suit in a federal court without getting a reparation order from the Commission. *National Pole Co.* v. *Chicago & N. W. R. R.* (C. C. A. 1914) 211 Fed. 65. See Notes, p. 512.

JOINT ADVENTURES—MUTUAL GOOD FAITH—SECRET PROFITS.—A, the assignee of 25 per cent. of the authors' royalties, secured the producing rights of a play. He then entered into a joint venture with B to produce the play, concealing his right to royalties. These he subsequently assigned to the plaintiff, who knew all the facts, and who, as the assignee through A of the authors' rights, seeks to enforce them against A and B. *Held,* two justices dissenting, his claim was not subject to any equities in B's favor. *Selwyn & Co.* v. *Waller* (App. Div. 1914) 146 N. Y. Supp. 7.

The obligation of perfect good faith imposed on partners, both in the negotiation for the partnership and in the course of the partnership business, Burdick, Partnership (2nd ed.) 323; *Butler* v. *Prentiss* (1899) 158 N. Y. 49, is equally incumbent on joint adventurers. *Getty*

v. *Devlin* (1873) 54 N. Y. 403; *Church* v. *Odell* (1907) 100 Minn. 98. A's failure to disclose the fact that he reserved an interest in the gross receipts irrespective of the net profits, was therefore a concealment amounting to fraud, which would enable B to rescind the contract. Lindley, Partnership (7th ed.) 524. It seems at least doubtful that an attempt by B to obtain this relief would be demurrable, as the principal case holds, for failure to allege that had he known the facts he would not have entered the venture. See 2 Pomeroy, Eq. Jur. (3rd ed.) §§ 901, 902, 910. He has, moreover, the further right, for which an allegation of damage is not necessary, *Bentley* v. *Craven* (1853) 15 Beav. 75; *Manufacturers' Nat. Bank* v. *Cox* (N. Y. 1874) 2 Hun 572, affd. 59 N. Y. 659, to compel A to account for this secret profit. *Brooks* v. *Belasco* (N. Y. 1905) 48 Misc. 597, 600; *Archer's Case,* L. R. [1892] 1 Ch. 322. The typical case of such a trust arises where a partner gets some secret profit from a stranger with whom the partnership deals, *Jordan* v. *Markham* (1906) 130 Ia. 546; *Mitchell* v. *Read* (1874) 61 N. Y. 123, (1881) 84 N. Y. 556, or where his business competes with that of the partnership. *Manufacturers' Nat. Bank* v. *Cox, supra; cf. Reis & Co.* v. *Volck* (N. Y. 1912) 151 App. Div. 613. The principal case, however, seems even more analogous to a case where a person forms an association, concealing his interest in the property which is to become the subject of the joint enterprise. Here, too, he holds his secret interest in trust. *Colton Improvement Co.* v. *Richter* (N. Y. 1899) 26 Misc. 26; *Church* v. *Odell, supra;* see *The Telegraph* v. *Loetscher* (1904) 127 Ia. 383. The assignee with notice of this secret profit should, therefore, take subject to the trust. *Cf. Trice* v. *Comstock* (C. C. A. 1903) 121 Fed. 620.

LIENS—MATERIALS FURNISHED FOR PUBLIC IMPROVEMENT.—The plaintiff furnished a highway contractor with coal which was used in operating a steam roller and traction engine. *Held,* the coal was not "material" for public improvements within the meaning of Sect. 5 of the Lien Law (N. Y. Laws 1909, c. 33, § 5). *Shultz* v. *Quereau Co., Inc.* (1914) 210 N. Y. 257, modifying 148 App. Div. 935.

In construing statutes giving a mechanic's lien to sub-contractors who furnish materials for the improvement of real estate, it has been held that in order to come within the purview of the statute the material furnished should form a part of the completed work. *Boston Furnace Co.* v. *Dimock* (1893) 158 Mass. 552; *Oppenheimer* v. *Morrell* (1888) 118 Pa. 189. This construction, which is applicable as well to similar statutes giving a sub-contractor a lien against the State, *Troy Public Works* v. *Yonkers* (1912) 207 N. Y. 81, is predicated upon the conception of a lien as in the nature of a mortgage, in order to effectuate which the materials furnished must be a part of the mortgage *res.* In some jurisdictions, however, the courts have extended the scope of such statutes to include explosives. *Schaghticoke Powder Co.* v. *G. & J. Ry.* (1905) 183 N. Y. 306; Snyder, N. Y. Lien Law (5th ed.) 35; see *Sampson Co.* v. *Commonwealth* (1909) 202 Mass. 326, 333. This extension is based upon the arbitrary rule that the test merely requires that the materials provided should go into the improvement and be consumed in the using. In the principal case, however, although the material supplied was consumed in improving the highway, yet it did not go into the road, and the court considered this a sufficient distinction to deny the lien. It is apparent that this conclusion is due chiefly to the necessity of having a well defined line of demarcation and is in accordance with the general tendency.

LIMITATION OF ACTIONS—SURETYSHIP—PART PAYMENT BY PRINCIPAL.—The obligee relied upon a part payment made by the principal within the statutory period, without the consent of the surety, to avoid the surety's defense of the Statute of Limitations. *Held,* the plaintiff's action was barred. *Dwire* v. *Gentry* (Neb. 1914) 145 N. W. 350.

If by his agreement the surety has become jointly liable with his principal, three views have obtained as to the ability of the latter to bind the former by a part payment which would toll the Statute of Limitations. By some courts such payment is regarded as effective in rendering both amenable to suit, by others it is deemed to obligate only the one who makes the payment, and by still others a middle view is adopted, namely, that such a payment, if made before the bar of the statute has been perfected, is operative as to both debtors, but if made thereafter, only against the party making it. See 11 Columbia Law Rev. 70; Childs, Suretyship, 241. A part payment, however, whether it be considered an admission of liability for the entire debt, which justifies the inference of a new promise supported by the original consideration, see 12 Columbia Law Rev. 467, or a mere waiver of the statutory defense, see 16 Harvard Law Rev. 517, must evidently be made by the party to be charged or his authorized agent, *Murdock* v. *Waterman* (1895) 145 N. Y. 55, and consequently, upon principle, one joint debtor, in no wise an agent for this purpose, should not be able so to extend the obligation of his co-obligor. If, however, the contract of suretyship does not create a joint liability, the fact that in the absence of express authority no agency for the purpose of tolling the Statute of Limitations can be predicated of this relation, would seem, in accord with the principal case, to preclude the principal from defeating, by a part payment, the surety's defense of the Statute of Limitations. See *Maddox* v. *Duncan* (1898) 143 Mo. 613; *Omaha Savings Bank* v. *Simeral* (1901) 61 Neb. 741. This result, moreover, is not affected by the decisions that afford the surety a remedy when he satisfies an obligation which has been barred against his principal by the running of the statute, *Godfrey* v. *Rice* (1871) 59 Me. 308, since such a recovery is based on a promise implied in law, see 5 Columbia Law Rev. 65, which arises only upon payment of the debt by the surety.

MUTUAL BENEFIT ASSOCIATIONS—MEMBERSHIP—INELIGIBILITY—FRAUD—RATIFICATION.—K, a saloon keeper, seeking to evade the constitution of the defendant association stated in his application for membership that he was a can-maker. B, the agent of the local lodge, participating in the fraud, forwarded K's application to the Supreme Lodge, which issued a certificate without knowledge of the fraud. For ten years K paid his dues and assessments to B's successors, who knew of K's business. *Held,* two judges dissenting, the defendant was not liable on the certificate. *Krecek* v. *Supreme Lodge of F. U. A.* (Neb. 1914) 145 N. W. 859.

While misrepresentation of a material fact in the application will nullify a policy issued thereupon, if the insurer, with knowledge of the misrepresentation, accepts premiums, dues, or assessments, he has, by his conduct, either estopped himself to set up the fraud or waived the misrepresentation. And the knowledge of the local agent, authorized to receive these sums, is deemed by some courts to be the knowledge of the insurer. *Cloverdale* v. *Royal Arcanum* (1901) 193 Ill. 91; *Alexander* v. *Grand Lodge* (1903) 119 Ia. 519; see *National Union* v. *Sherry* (Ala. 1913) 61 So. 944, 947. But on principle there can be

no estoppel when the applicant has wilfully falsified, for in no sense was he misled by the representation of the insurer. 2 Bacon, Benefit Societies (3rd ed.) 1114; *McCoy* v. *Roman Catholic etc. Co.* (1890) 152 Mass. 272; *Clemans* v. *Supreme Assembly* (1892) 131 N. Y. 485; 2 Columbia Law Rev. 243. Furthermore, the local agents of benefit associations generally have no authority to waive an essential element in a contract. *Kocher* v. *Supreme Council* (1901) 65 N. J. L. 649; see *Northern Assurance Co.* v. *Grand View Bldg. Assn.* (1902) 183 U. S. 308; but see *Williams* v. *Relief Assn.* (1896) 89 Me. 158; *Rice* v. *New Eng. Mut. Soc.* (1888) 146 Mass. 248. And where, as in the principal case, the constitution of the association prohibits such contracts it is difficult to see how any agent can bind the association by waiving the constitution. When the applicant colludes with the agent to cheat the insurer obviously no estoppel or waiver can be invoked against the latter. *National Ins. Co.* v. *Minch* (1873) 53 N. Y. 144; *Wilhelm* v. *Columbian Knights* (1912) 149 Wis. 585. The decision in the principal case that B's successors could not waive the fraud seems clearly sound, for a subordinate agent, without the actual consent of the principal, should not be allowed to ratify a void act of another agent.

PUBLIC SERVICE CORPORATIONS—REGULATION OF RATES.—The plaintiff gas company contended that the value of their property upon which they were entitled to a fair return was enhanced by the paving of the streets above their gas mains, and that this increased value should be considered in the regulation of their rates. *Held,* this public improvement should not be considered in determining what rates the company was entitled to charge. *People ex rel. Kings County Lighting Co.* v. *Wilcox* (1914) 210 N. Y. 479. See Notes, p. 522.

RELIGIOUS ASSOCIATIONS—CHURCH DESTROYED BY FIRE—RIGHTS OF PEWHOLDER.—The plaintiff was successor in title to a deed conveying two pews "so long as the church shall endure". The church edifice was completely destroyed by fire and the plaintiff claims an allotment of pews in a temporary structure. *Held,* the pewholder's right was terminated by the destruction of the church. *Witthaus* v. *St. Thomas' Church* (1914) 146 N. Y. Supp. 279.

At early common law the right to a pew descended to the heir, 2 Black. Comm., *429, and was consequently designated as real property, but it is now classified as personal property in some jurisdictions. See *Church* v. *Wells's Exrs.* (1855) 24 Pa. 249. It would, however, seem to be rather an easement in the nature of an usufructuary right to occupy the pew during services, 1 Reeves, Real Property, § 55, see *Presbyterian Church* v. *Andruss* (1848) 21 N. J. L. 325; *Sohier* v. *Trinity Church* (1871) 109 Mass. 1, 21, than an estate in the soil or church edifice. The existence of this easement, as in the case of party wall easements, see 9 Columbia Law Rev. 74, is primarily dependent upon the existence of the church structure; in case the edifice is destroyed by fire or other casualty, the easement is extinguished and the pewholder is entitled to no reimbursement for his loss. 1 Reeves, Real Property, 69. Similarly, where the building is in a ruinous condition and it becomes necessary to abandon or alter it, the pewholder's rights are lost. *Kellogg* v. *Dickinson* (1846) 18 Vt. 266; see *Kincaid's Appeal* (1870) 66 Pa. 411. On the other hand, while the proprietors may alter, remove or destroy the pew at liberty, see *Jones* v. *Towne* (1878) 58 N. H. 462, still, if the building is fit for occupancy and is razed

or altered merely as a matter of expediency or the pew is wantonly destroyed, compensation must be made. See 1 Tiffany, Real Property, 698; *Mass. Baptist Miss. Soc.* v. *Bowdoin Sq. Baptist Soc.* (1912) 212 Mass. 198. It might well be argued, however, that the words of the grant contemplated the creation of a right to a pew so long as the particular congregation should exist, and thus take the case out of the general rule that the easement is extinguished upon the destruction of the church edifice.

WILLS—DYING WITHOUT ISSUE—TO WHAT TIME REFERRED.—The testator gave real and personal property to A, but "if A shall die leaving issue surviving her, then to such issue and their heirs forever." But "if A shall die without issue surviving her" the property to return to B. *Held,* A, surviving the testator, took a defeasible fee. *Rees* v. *Williams* (N. C. 1913) 80 S. E. 247.

Where there is a devise in fee or an absolute bequest with a gift over in case the first taker dies without issue, the rule is adopted in many jurisdictions that the contingency is operative only by a death without issue during the testator's lifetime. See 14 Columbia Law Rev. 461. This rule is based on considerations other than the possibility of the gift over being void for remoteness after an indefinite failure of issue, *Hackney* v. *Tracy* (1890) 137 Pa. 53; Gardner, Wills, 512, if it were held that a dying without issue after, as well as before, the testator's death was contemplated. Indeed, the rule has frequently been applied when the gift over was upon a failure of issue which by the wording of the will was a definite one. *Fowler* v. *Duhme* (1895) 143 Ind. 248; *Stokes* v. *Weston* (1894) 142 N. Y. 433. The statute enacted in the jurisdiction of the principal case, which is similar to statutes very generally adopted, providing that the phrase shall refer to a dying without issue at the death of the taker of the estate subject to the contingency, appears to have had the object merely of abolishing the construction which regards it as providing for an indefinite failure of issue. It would seem, therefore, that the question whether the phrase is one of limitation or furnishes merely a substitutionary gift, see 8 Columbia Law Rev. 37, should not be determined by such a statute, but should still be decided by independent considerations. See *Harvey* v. *Bell* (1904) 118 Ky. 512; *Frank* v. *Frank* (1908) 120 Tenn. 569; but see *Buchanan* v. *Buchanan* (1888) 99 N. C. 308; *Sims* v. *Conger* (1860) 39 Miss. 231.

WILLS—FRAUD IN PROCURING PROBATE—JURIDICTION OF EQUITY.—Subsequent to the execution of a will, the testator married the plaintiff, who was still living at the testator's death. By virtue of a Washington statute, these circumstances constituted a revocation of the will. Nevertheless, the defendants, named as legatees in the instrument, procured its probate. The plaintiff, believing that the testator died without property, did not contest the will in the probate court, but fourteen years later sought to have the probate decree set aside in equity. *Held,* a demurrer should be sustained. *In re Hoscheid's Estate* (Wash. 1914) 139 Pac. 61.

It was early held in England that equity, acting under its general jurisdiction to relieve against fraud, 2 Pomeroy, Eq. Jur., § 912, might cancel a will procured by fraud or undue influence. *Maundy* v. *Maundy* (1638) 1 Ch. Rep. 122; *Goss* v. *Tracy* (1715) 1 P. Wms. 288. But this jurisdiction was later denied as to wills of personalty on the ground

that the decree of the ecclesiastical court granting probate was conclusive of the issue of fraud, *Archer* v. *Mosse* (1686) 2 Vern. 8, and that the plaintiff's only remedy was a review of or appeal from that decree. *Allen* v. *M'Pherson* (1847) 1 H. L. C. *191. A distinction was taken, however, where, as in the principal case, the fraud lay in procuring the decree; and here, it appears, equity will still grant relief. See *Barnesly* v. *Powel* (1748) 1 Ves. Sr. 120; 1 Williams, Executors, 435; 2 Pomeroy, Eq. Jur., § 913 n. The general English rule has been uniformly followed in this country. *In re Broderick's Will* (1874) 21 Wall. 503; *Vincent* v. *Vincent* (1906) 70 N. J. Eq. 272, but its application has been limited to those cases where the contestant's remedy was adequate. See *Phillips* v. *Flagler* (1913) 143 N. Y. Supp. 798. The latter condition exists, it would seem, in cases where the fraudulent acts are discovered after the brief period for contesting the will has expired, see *Smith* v. *Boyd* (1901) 127 Mich. 417, and in such case it seems that equity should deprive the fraudulent devisee of his unconscionable advantage by declaring him a trustee for the heir. See *Allen* v. *M'Pherson, supra,* *216. Thus limited, the power of equity would not constitute an encroachment upon the jurisdiction of other tribunals, the objection which underlies the English rule. Aside from the question of laches therefore, it would seem that had the plaintiff's bill been grounded on the theory of constructive trust the proper holding would have been contrary to the result actually reached.